

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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| DONALD ROY, |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | Civil No. 94-37-B |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Respondent |) | |

**RECOMMENDED DECISION TO DENY PETITIONER'S MOTION
FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255**

Donald Roy moves this Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Roy claims that his Sixth Amendment right to effective assistance of counsel was denied because his lawyer at the sentencing hearing failed to seek departures from the federal sentencing guidelines based on Roy's diminished mental capacity and his voluntary disclosure of information to authorities. The Court recommends that the motion be denied.

I. Background

Between 1989 and 1991, Roy supplied several Maine residents with cocaine. Roy was charged in a six-count indictment on October 24, 1994, for conspiracy, distribution of cocaine, and use of communication facilities to distribute the proceeds of a crime. Pursuant to a plea agreement with the government, Roy eventually pleaded guilty on February 22, 1995, to one count of conspiracy to possess cocaine with the intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 2. On June 12, 1995, Roy was sentenced to fifty-seven months in prison, with credit for time served, to be followed by four years of supervised release. The court waived all fines, but imposed a \$50 assessment fee. At the hearing, the government requested that the "escape valve"

provisions of section 5C1.2 of the sentencing guidelines be applied to reduce Roy's sentence to below the sixty-month statutory minimum guideline range. The court acceded to the request and, accordingly, imposed a sentence less than sixty months. Roy's sentence was summarily affirmed on direct appeal. *United States v. Roy*, No. 95-1697, slip op. at 2 (1st Cir. March 12, 1996) (per curiam). Noting that Roy failed to request downward departures at the trial for his current claims of diminished capacity and voluntary disclosure of information, the First Circuit declined to entertain the claims. *Id.* The Court also noted that Roy's contention that he received ineffective assistance of counsel because his lawyer did not request such departures was "without merit, for there was scant, if any, evidentiary support for a departure." *Id.*

II. Discussion

Roy bases the current motion on a claim of ineffective assistance of counsel at his sentencing. A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam). Finding Roy's allegations insufficient to justify relief even if accepted as true, the Court recommends that his motion be dismissed without a hearing.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Roy contends that because his lawyer did not request at the sentencing hearing downward departures for his diminished mental capacity pursuant to section 5K2.13 of the sentencing guidelines and for voluntary disclosure of information pursuant to section 5K2.16 of the sentencing guidelines, he was denied the right to effective assistance of counsel. At the sentencing hearing, neither party requested that Roy's sentence be reduced due to Roy's history of mental illness, although such information was before the court in the pre-sentencing investigation report. The pre-sentencing investigative report noted that, despite his prior history of bipolar disorder, Roy appeared to possess at least average intelligence. The report included a mental health professional's observation that Roy's intellectual functioning was above average. Such information confirms the conclusion of the First Circuit that Roy's attorney acted competently in not pursuing a departure request pursuant to section 5K2.13. No evidence or argument was presented at the trial or sentencing hearing to satisfy the section's requirement that, for a departure to be warranted, "the reduced mental capacity of a defendant must have contributed to *some* extent to the commission of the offense." *United States v. Lauzon*, 938 F.2d 326, 331 (1st Cir. 1991); U.S. Sentencing Guidelines Manual § 5K2.13.

Roy's second claim of ineffective assistance of counsel relates to his lawyer's failure to request a departure from the sentencing guidelines based on Roy's voluntary disclosure of information to the government. A review of the record reveals, however, that his counsel's

performance once again was neither constitutionally deficient nor prejudicial to Roy. There is little evidence that section 5K2.16 even would have been applicable to Roy's case, never mind that his attorney should have, in the face of such evidence, advocated for its application. The record discloses that Roy is not entitled to relief on this issue.

III. Conclusion

For the foregoing reasons, the Court recommends that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

**Eugene W. Beaulieu
United States Magistrate Judge**

Dated in Bangor, Maine on February 12, 1997.